TIMBUNAN ALAM DEVELOPMENT SDN BHD

v.

PLATICORP HOLDINGS (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[COMPANIES WINDING-UP NO: D6-28-753-1999]
24 JANUARY 2000

COMPANY LAW: *Winding-up - Petition - Affidavit in verification in support of petition - Whether service required*

COMPANY LAW: *Winding-up - Petition - Signing of petition by solicitors on petitioner's behalf - Whether an irregularity - Whether curable under r. 194(1) Companies (Winding-up) Rules 1972*

WORDS AND PHRASES: *"officer or agent" - Interpretation - Companies Act 1965, s. 194 - Whether includes a solicitor*

The petitioner filed a petition in court against the respondent based on a claim that the respondent was indebted to the petitioner in the sum of RM1,430,000.

At the hearing, the respondent raised two preliminary objections: (i) that the affidavit in verification in support of the petition was not served on the respondent; and (ii) that the said petition was not signed by the petitioner but by the solicitors on its behalf and that amounted to a material defect not curable by the court under its inherent jurisdiction.

Held:

[1] Neither the Companies Act 1965 nor the Companies (Winding-up) Rules 1972, procedurally require the affidavit in verification in support of the said petition to be served on the respondent. All that is required is that a petition is to be served under r. 26 of the Rules. Further, r. 25 states that every petition shall be served upon the company.

[1a] A petition proper comes into existence immediately upon the filing of the petition into court whereas the affidavit in verification in support of the petition is procedurally required to verify the petition within four days after the filing of the petition. Thus, the petition stands independently of the affidavit in verification and the said affidavit cannot be said to be a part of the petition.

[1b] Notwithstanding the above, the question of service did not arise because the facts indicate that the affidavit in verification of the said petition was served on the respondent.

[2] The Bankruptcy Act 1967 and the Rules thereunder are not applicable to winding-up proceedings which are specially governed by the Companies Act 1965 and the Companies (Winding-up) Rules 1972. This has been decided by the Court of Appeal in *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd*.

[3] Rule 22 of the Companies (Winding-up) Rules 1972 does not require the petitioning creditor to personally sign the petition as in the case of the creditor's petition under the Bankruptcy Act 1967.

[4] A corporation can only be represented in court by its agent who must be an authorised person to act on the instructions of the company and in that capacity to bring or defend the actions, provided when bringing such actions, clear identity of his capacity is disclosed. In this case, the solicitors had correctly signed the said petition on behalf of the petitioner.

[4a] By virtue of s. 194 of the Companies Act 1965, the words "officer or agent" in relation to a corporation include an advocate which should also include a solicitor based on the fused system of the legal profession in this country.

[5] The non-signing by the petitioner of the said petition did not cause any prejudice or substantial injustice to the respondent. The non-signing was only an irregularity curable under s. 194(1) of the Companies (Winding-up) Rules 1972.

[Preliminary objections dismissed.]

Case(s) referred to:
YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn. Bhd. [1996] 3 CLJ 51 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 194
Companies (Winding-up) Rules 1972, rr. 22, 25(1), 26, 194(1)

For the petitioner - S Thilaga; M/s FY Poh & Co
For the respondent - Simon Hue; M/s Ho Loke & Koh

Reported by Kavitha Gunasegaran

JUDGMENT

KL Rekhraj J:

The petitioners filed a petition in court against the respondent on 3 September 1999, averring that the respondent company was indebted to the petitioner in the sum of RM1,430,000 (excluding interest) worked up as at 21 May 1998; being the balance of the purchase price payable over the property held under H.S.(M) 32832 P.T. No. 32672 Mukim of Ampang with a four-and-a-half storey shophouse erected thereon and better known as Lot 14, Jalan Perdana 10/12 Pusat Perdagangan Tasik Perdana, 55300 Kuala Lumpur.

The said petition was signed by FY Poh & Co as solicitors for the petitioners. At the hearing of the petition the respondent solicitors took two preliminary objections:

(i) that the affidavit in verification in support of the petition was not served on the respondent;

(ii) that the said petition was not signed by the petitioner themselves – as a limited company; but instead was signed by the solicitors of the petitioners; and this amounted to a material defect, not curable by the court under its inherent discretionary powers; and as such it should be struck off.

Upon hearing the arguments, I dismissed both the preliminary objections and my reasons for dismissing are:

(i) that neither the Companies Act 1965; nor the Companies (Winding-up) Rules 1972, procedurally require the affidavit in verification of the petition, to be served on the respondent. All that is required is that **a petition is to be served** under r. 26 – which reads:

> Every Petition for the Winding-up of a company ... shall be verified by an affidavit ... and and in the case (where) the Petition is presented by a corporation (then the said affidavit) shall be affirmed by some director, secretary or other principal officer; and sworn and filed within four days **after the Petition is presented**.

Further by r. 25(1) "Every petition shall be served upon the company"; so the question for the court was **whether the petition includes the affidavit in verification** and the court held that a petition proper comes into existence immediately upon the filing of the petition into court; whereas the affidavit in verification is procedurally required to verify the petition within four days

thereafter of the filing of the petition. In the light thereof, the petition perse stands independently of the affidavit in verification; and the affidavit cannot therefore be said to form a part of the petition.

In any event, from the affidavit of service of the petition, affirmed by Mr. Allfeat M. Ignally on 16 October 1999; he deposed, that he had personally called at the registered office on 22 September 1999, at 11.45 a.m. and thereat served upon a person identified as Catherine Chong, a servant of the company, who accepted service of both the petition and the affidavit in verification of the petition; but **refused** to acknowledge receipt thereof, by affixing the respondent's rubber stamp. With this averment on record, without any denial or rebuttal by a counter-affidavit, I am satisfied that notwithstanding my holding otherwise on the question of service on the affidavit in verification; it was so served and the question of service as such does not arise.

On the second preliminary point, the respondent solicitors rested his argument based on the requirements of forms adopted under the Bankruptcy Act (1967) and the Rules thereunder – more particularly Form 9 (Bankruptcy Rule 99) which requires the petitioning creditor to sign the creditors petition and the signing thereof to be attested by a solicitor.

I must from the outset state that the Bankruptcy Act (1967) and the Rules thereunder are not applicable *pari materia* to the winding-up proceedings; which are specifically governed by the Companies Act (1965) and the (Winding-up) Rules 1972. This has been decided by the Court of Appeal in the case of *YPJE Consultancy Service Sdn. Bhd. v. Heller Factoring (M) Sdn. Bhd.* [1996] 2 AMR p. 2014 at 2024 where the court held "that the authorities from the Bankruptcy cases are not applicable to winding-up proceedings."

Further r. 22 of the Winding-up Rules 1972 requires the winding-up petition to be in Form 2 or 3 with such modification or variation as circumstances may require. It does not spell out or require the petitioning creditor to personally sign the petition; as in the case of the creditor's petition under Form 9 of the Bankruptcy Act. The preamble and the statements to the petition in Form 2 under the Companies Act concludes with words "your petitioner therefore humbly prays as follows – 'That the said company be wound up.' "; without any reference or guidance as to who signs the petition!

It is a trite law, that a corporation can only be represented in court by its **agent**, who must be an authorised person to act on the instructions of the company; and in that capacity to bring or defend the actions; provided when

bringing such actions, clear identity of his capacity is disclosed in bringing the action for and on behalf of the company; and which the solicitors M/s FY Poh & Co have correctly done by signing the petition as such on behalf of the company.

In support of this argument, I refer to s. 194 of the Companies Act 1965 – on the interpretation of the word "officer or **agent**" in relation to corporation; includes **an advocate**; and with it; because of the fused system of the legal profession in our country, to mean a "solicitor" as being the person appointed by the corporation to do all such acts or things for and on behalf of the company.

The call of the respondent's solicitors on the format to be signed by the petitioner is a call in futility; as the non-signing by the petitioner of the petition personally, does not and has not in any way shown to have caused any prejudice, or substantial injustice to the respondent; and the court upon being so satisfied, held that such non-signing was only an irregularity, curable under r. 194(1) of the Winding-Up Rules 1972 –

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the **court is of the opinion** that substantial injustice has been caused by the defect or irregularity; and that injustice cannot be remedied by any order of the Court.

I am satisfied that the petition as presented is properly signed by its authorised agent of the company, under the hand of its solicitors acting for and on behalf of the company; and their signing as such has not caused any injustice or prejudice to the respondent.

The respondent has appealed to the Court of Appeal on these points, and in the interim period, pending the appeal, **by consent** of the parties a **provisional** liquidator has been appointed over the affairs of the respondent company.